SAMAR BINTE MANSOR v. MUSTAFA KAMARUL ARIFFIN

[F.C. (Suffian L.P., Ali and Raja Azlan Shah F.JJ.) May 14, 1974]

[Alor Star — Federal Court Civil Appeal No. 128 of 1973]

Practice and Procedure — Appeal — Question of fact — Negligence — Whether appeal court can interfere with finding of trial judge.

In this case the appellant had been knocked down by a motor cycle ridden by the respondent when she was crossing a road from behind a bus. The learned trial judge dismissed her claim for damages and she appealed to the Federal Court.

Held (Suffian L.P. and Ali F.J., Raja Azlan Shah F.J. dissenting) allowing the appeal: in the peculiar circumstances of the case, the learned judge could and should have inferred from the undisputed evidence and from the facts found by him that the respondent was negligent and that the appellant was also partly negligent. The culpability of the respondent should be apportioned at 50%.

Cases referred to:-

(1) *Benmax* v. *Austin Motor Co. Ltd.* [1955] A.C. 370, 376.

(2) *Mersey Docks and Harbour Board* v. *Procter* [1923] A.C. 253, 258-259.

FEDERAL COURT.

Triptipal Singh for the appellant.

G. Moganasundram for the respondent.

Suffian L.P.: Cik Samar binte Mansor got off a bus, then walked behind the bus to go to the opposite side of the road when she was run into by a motor cyclist, Mustafa Kamarul Ariffin, moving in the opposite direction to the bus, and was injured. She sued the motor cyclist. The learned trial judge dismissed her claim and she appeals to this court.

The learned trial judge was concerned to determine who was telling the truth, but we sitting in an appellate court are concerned to determine not so much the truth as whether there had been error on the part of the trial judge.

The issue is a simple one — was the learned trial judge in error in concluding that the defendant was not negligent?

The evidence for the plaintiff was entirely oral, and so was the evidence for the defendant — the truth of neither of which could be tested against independent evidence such as often in traffic accident cases is available from brake marks, police measurements and so on. So in view of this, this court should be reluctant to disturb the learned judge's finding.

However, in the peculiar circumstances of this case, I think that the learned judge could and should have inferred from the undisputed evidence and from the facts found by him that the defendant was negligent and the plaintiff also partly negligent.

This bus was going in the direction of Bukit Mertajam, and on board were, among others, the plaintiff, her son and her nieces. About ¼ of a mile this side of Bukit Mertajam, the bus stopped because a shophouse was on fire ahead on the left side of the road. Other traffic also stopped. The passengers got off the bus, and some of them, including the plaintiff and her two companions, tried from behind the bus to cross the road when she was run into by the defendant.

The defendant himself had been going towards Bukit Mertajam, but had been turned back by the police because of the fire. He was in front, followed by two friends on two other motor cycles. On the defendant's own evidence, there were cars and other buses stopped on the same side as the plaintiff's bus and there were people on the other side of the road. From the evidence it is clear that a crowd had collected near the scene because of the fire. And yet on his own admission he was riding at between 20 to 25 m.p.h. He claimed that this speed was not fast in the circumstances. Whether any particular speed is reasonable or not depends on the circumstances.

With respect I am of the view that in the circumstances of this case when cars and buses had stopped on the right side of the road thus leaving only a narrow passage on the other side of the road, when a crowd had collected because of the fire and when there were many persons at the scene of the accident, some standing on the grass verge and some on the road itself, riding at 20 to 25 m.p.h. is unreasonable, and therefore the defendant was at fault when he knocked down this old lady. But the defendant was not entirely to blame, because it was unreasonable of the plaintiff to try and cross the road from between two buses (as she did) without a proper look-out, and I would apportion her culpability at 50%.

The learned judge held that if the defendant had been entirely to blame, he would have awarded the old lady $6,000 damages. This amount was not criticised by counsel for her before us, and accordingly instead of the learned judge's judgment (which is hereby set aside), there shall be judgment for the plaintiff/appellant in the sum of $3,000, and she shall also have her costs here and in the court below. She should also have back her deposit.

Ali F.J. (read by **Suffian L.P.**): The appellant while crossing the road was knocked down by a motorcycle. Her claim for damages in respect of injuries sustained was dismissed. She has now appealed to this court.

The only question for our consideration is on liability.

As between the motor-cyclist and the appellant, who both have the right to use the highway, the motor-cyclist was clearly under a duty of care not to knock the appellant who was walking on the road. The question, as it must be, is not whether the appellant but whether the motor-cyclist was negligent. The reason for this is that the motor-cyclist was in charge of a vehicle which as frequently observed in reported cases is a lethal weapon.

Accepting, as I do, the facts as found by the learned trial judge in this case the position shortly before the collision seems to be this: The motor-cyclist was riding on or near the crown of the road. As there were other vehicles on his right side, the road, as stated by the learned trial judge in his judgment, was just wide enough for a person to take a step or two in order to cross to the other side. This means that the motor-cyclist in the position described was closer to the parked vehicles on his right than to the crowd on his left. In that position he must have realised the danger that someone might emerge from behind one of

the parked vehicles in order to cross the road. So realising he should have exercised such caution or care that should any foolish person such as the appellant in this case present such a danger he would be able to avoid a collision. Experience would have taught him to travel much more slowly than he did in this case. He admitted travelling at about 20-25 miles per hour. He could not avoid knocking into the appellant because in the circumstances 20-25 miles per hour speed was too fast.

For reasons stated above, I respectfully agree with the learned Lord President that we should allow this appeal and hold the motor-cyclist 50% liable.

Raja Azlan Shah F.J.: When did the plaintiff cross the road? That, in my opinion, is the crux of the matter.

According to the plaintiff, she said there were others crossing the road and "she went across the road". But she did not categorically say in her evidence that she crossed the road together with the crowd. She said she stayed for some time after the bus had stopped before getting down. Physically she was stoutish and from that the learned judge inferred that she was not agile.

Against that the defendant said that the plaintiff came out from between two buses and she straightaway crossed the road from his right to his left and at that time there was nobody crossing the road. He had no time to avoid the accident.

The one indisputable fact of the case was that the plaintiff alone was knocked down. This led the learned judge to draw the inference that the crowd in the sense of a multitude of persons had already crossed the road before the plaintiff did so. According to him, the picture of a motor-cyclist hurtling into a crowd on a course described as "weaving in and out" and hitting only the plaintiff was against all probabilities.

It is axiomatic that a finding of negligence though involving matters of inference, is properly regarded as a finding of fact. For an appellant to succeed in an appeal against a finding of fact made by a single judge, he must convince the appellate court that the learned judge was wrong in his conclusion. That the appeal may be by way of re-hearing does not alter the situation. A hearing is not, however, a retrial of the issues. The question is not whether an appellate court can substitute its view of the facts which of course it is empowered to do so, but whether it should do so. However much an appellate court may be in an equal position with the trial judge as to the drawing of inferences, it ought not to reverse the finding of fact unless it is convinced that it is wrong. It is not whether the inferences are right but whether an appellate court is convinced that they are wrong. If that finding is a view reasonably open on the evidence, it is not enough to warrant its reversal just because an appellate court would have come to a different view. Merely differing views do not establish that either view is wrong, but in balancing these two views an appellate court should give due weight to the nature of the fact as found by the trial judge. Thus *Benmax* v. *Austin Motor Co. Ltd.*[1] is authority for the proposition that an appellate court is not bound by inferences of fact drawn by the trial judge which did not turn on the credibility of witnesses, seen and heard by him, that it may not examine the matter afresh.

In *Mersey Docks and Harbour Board* v. *Procter*[2] Vicount Cave L.C. said:

> "The duty of a court hearing an appeal from the decision of a judge without a jury was clearly defined by Sir Nathaniel Lindley M.R. in *Coghlan* v. *Cumberland* [1898] 1 Ch. 704 and by Lord Halsbury in *Montgomerie & Co.* v. *Wallace-James* [1904] A.C. 73 and is no longer in doubt. The procedure on an appeal from a judge sitting without a jury is not governed by the rules applicable to a motion for a new trial after a verdict of a jury. In such a case it is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly. In the present case there is no question of the credibility of witnesses. The material facts, so far asy they are known, are undisputed; and the Court of Appeal was at liberty, and indeed was bound, to draw its own inference from them."

The material fact of the present case, *i.e.*, when did the plaintiff cross the road, was disputed. It was then not merely a matter of inference to be drawn from facts proved or admitted, but also a matter of credibility. The trial judge alone was in the position to decide, from the manner and degree of the impression created upon his mind by each witness, which side in the end was worthy of belief in a trial where the main conflict of fact entailed in substance flat contradictions of the opposing evidence. This is even more so in a running-down case, where competing credibility is implicit in the problem calling for solution.

The learned trial judge accepted the defendant's version that they were approaching in a single file travelling at a moderate speed, that they were not weaving in and out of the crowd, and in the circumstances of the case concluded that the defendant had not sufficient room or time to avoid the plaintiff when she "straightaway" crossed the road. He was therefore not prepared to find that any negligence of the defendant caused or contributed to the plaintiff's injuries.

In my view, there was material on which the trial judge could have found that the defendant by his negligence caused or contributed to the plaintiff's injuries. If he had so found, I cannot see any ground on which his finding of fact could have been disturbed. But he was not bound to arrive at that conclusion. That to my mind was not the only reasonable conclusion to which a tribunal of fact could come in the circumstances of the case, nor, in my opinion, was there any such preponderance in favour of the view that the defendant was so negligent that it could be properly be held that the trial judge was wrong in finding in his favour. It seems to me that either view of the defendant's conduct in relation to the plaintiff's injuries was reasonably open on the evidence: there is in my view no basis for considering one view preponderates over the other.

I say that the findings of the trial judge ought not to be disturbed. Accordingly this appeal should be dismissed with costs.

Appeal allowed.

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